March 21, 2016

The Honorable Judge Jeanne M. Cochran
Administrative Law Judge
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
Saint Paul, MN 55164-0620

Re: In the Matter of the Proposed Rules of the Public Employment Relations Board Governing Hearings and Procedures; OAH Docket No. 68-9010-33057; Governor's Revisor's ID Number R-4345

Dear Administrative Law Judge Cochran:

This letter contains the Public Employment Relations Board's responses to comments it has received.

1. The Public Employment Relations Board (PERB) has met its burden to show that the proposed rule is needed and reasonable.

Minnesota Statutes, section 14.14, subdivision 2, requires the PERB to "make an affirmative presentation of facts establishing the need for and reasonableness of the proposed rules . . . ." In making its affirmative presentation, the Board must show that its action has a rational basis. See Beck, G., and M. Konar-Steenberg, *Minnesota Administrative Procedure, Third Edition* (2014).

The PERB has stated its affirmative presentation in its Statement of Need and Reasonableness, which the PERB relies on to establish the need for and reasonableness of the proposed rules. The PERB's evidence clearly meets the rational basis standard and compels one to conclude that the proposed rules of the PERB are needed and reasonable.

2. The PERB has responded to the comments made and issues raised during the hearing and comment period.

7325.0020 DEFINITIONS

Subpart 2
Judge Cochran asked for clarification regarding the terms "PERB" and "Board" in the "Definitions" section of the rules.

PERB's Response:

"Board" means the governing body of the PERB, the appointed members alone. Separate definitions help to distinguish between the agency (PERB) that is larger than its appointed members (Board).

Subparts 3 & 4
Minnesota State Colleges and Universities (MNSCU) commented that the definition of "charged party" needs to be changed to say that individual employees may have charges filed against them.

PERB's Response:

The comments to Subp. 3 & 4 suggest modifying the language to reflect individuals may have charges filed against them. The language currently uses "party" which is broad enough to include individuals. The comments reflect a dislike of the term "entity," but the word "entity" covers all the non-persons who may file a charge: employer, employee organization, employer organization, exclusive representative or any other organization. See Minn. Stat. 179A.13, subd. 1(a). The rules do not define who may be a charged or charging party, because those are defined by PELRA. No revision is necessary or appropriate.

Subpart 5
Minnesota Management & Budget (MMB) and MNSCU commented that the definition of "charge or unfair labor practice" is not consistent with PELRA which says that persons and organizations can file charges. Also, the definition does not allow an "organization" to file a charge. The definition should be changed to allow a person or organization to file a charge against another person or organization.

MNSCU also commented that the definition of "charge" should be changed to allow both persons and organizations to file a charge. As written, an organization could not bring a charge against a person. Also, the word "entity" should be changed to "organization" to be consistent with Minn. Stat. 179A13, subd. 1(a).

PERB's Proposed Rule Changes:

Line 1.17 should be modified so it reads "a person <u>or entity</u> alleges that ...".

PERB's Response:

Using the word "entity" covers all the non-persons who may file a charge: employer, employee organization, employer organization, exclusive representative or any other organization. See Minn. Stat. 179A.13, subd. 1(a). This revision is not a substantial change to the published proposed rules.

New Definitions
MNSCU commented that the definition of "charge" should refer to the charge form referred to in 7325.0110, and should say that claims not reduced to writing in the form cannot be characterized as charges.

PERB's Response:

The requirement that a charging party use a charge form is addressed in Minn. Rule. 7325.0110. It is inappropriate for a definition to include substantive requirements. No revision is necessary or appropriate.

MNSCU commented that "Aggrieved Party" should be defined, as the statute says aggrieved parties can file charges. "Exception" should be defined for clarity. "Preponderance of the Evidence" should also be defined for clarity.

PERB's Response:

There is a suggestion that the phrase "aggrieved party" be defined. Minn. Stat. 179A.13, subd. 1(a) uses the word "aggrieved." That phrase is sufficiently clear.

Similarly, there is a suggestion that "preponderance of the evidence" be defined, but that phrase is also clear. Minn. Stat. 179A.13, subd. 1(g).

The comments also call for a definition of "exceptions." Minn. Stat. 179A.13, subd. 1(k). This term is clear in the statute; and Minn. Rule 7325.0400, subp. 3 explains sufficiently what is required in an exception. No revision is necessary or appropriate.

MNSCU suggests that "Complaint" should be defined because "Charge" is defined.

PERB's Proposed Rule Changes:

The following definition of complaint should be added after line 1.18, and renumber the subsequent subparts accordingly, to differentiate a complaint from a charge:
Subp. 6. **Complaint**. "A complaint is a document issued by the board alleging that a person or entity has committed one or more unfair labor practices."

PERB's Response:

This change is designed to differentiate a "charge" from a "complaint." This revision is not a substantial change to the published proposed rules.

7325.0100 FILING AND SERVICE GENERALLY

League of Minnesota Cities (LMC), Coalition of Greater Minnesota Cities (CGMC), MMB, and MNSCU all viewed filing and service via e-mail as unreliable in the absence of a web-based system.

PERB's Response:

The process is designed to be cost effective and efficient. Email is widely used in the legal system and is sufficiently reliable. The requirement that the PERB serve the charged party with the charge provides an additional safeguard. Minn. Rule 7325.0110, subp. 5. No revision is necessary or appropriate.

LMC, CGMC, MMB, and MNSCU also had concerns regarding on whom the documents must be served. Commenters also requested a requirement that an affidavit of service be filed with the Board upon filing of the charge form.

Through an online comment, CGMC suggested that the PERB adapt procedures similar to Minn. R. Civ. P. 4.03 for service.

PERB's Response:

The charge form which a charging party must use already requires the contact information for the charged party and its representative or attorney. The Rules of Civil Procedure are inappropriate in the labor relations context, especially when charges may be filed by unrepresented persons. An affidavit of service, moreover, is unnecessary because the rules require that the charge form contain a statement that the charging party has served the charge upon the charged party. Minn. Rule 7325.0110, subp. 2(H). The Board or its designee will also be serving the charged party with the charge. Minn. Rule 7325.0110, subp. 5. No revision is necessary or appropriate.

Judge Cochran asked when a document that has been sent by email is considered filed.

PERB's Proposed Rule Changes:

Lines 2.12-2.13 should be amended to read: "C. A filing by United States mail is deemed filed on the date of its postmark. A filing by email is deemed filed on the date it is sent. A filing occurring on a Saturday…"

PERB's Response:

Additional language clarifies when filing by email is accomplished. This revision is not a substantial change to the published proposed rules.

7325.0110 FILING, SUPPORTING AND RESPONDING TO A CHARGE

Subpart 2, Form Information

MNSCU commented that in subp. 2(F) the word "either" is ungrammatically used to reference three statutory sections.

PERB's Proposed Rule Changes:

Lines 3.15 – 3.16 should be revised to read: "the specific section of the law~~, either~~ (Minnesota Statutes, section 179.11, 179.12, or 179A.13) alleged to have been violated;".

PERB's Response:

This deletion is to fix an ungrammatical use of the word "either" to refer to three statutory sections. This revision is not a substantial change to the published proposed rules.

LMC and CGMC both suggest that to promote accountability, the form should include some declaration that the charge form has been read and the information provided is true to the best of the charging party's knowledge and belief.

PERB's Proposed Rule Changes:

Line 3.17 should be amended to read: "…practice alleged; ~~and"~~

Line 3.19 should be amended to read: "…party~~.~~; and"

A section should be added after line 3.19 as follows: "I. a signature acknowledging that the charging party has read the charge and that the statements in the charge are true to the best of

the charging party's knowledge and belief."

PERB Response:

The change is consistent with charge forms used by the National Labor Relations Board and the Minnesota Department of Human Rights. This revision is not a substantial change to the published proposed rules.

Judge Cochran asked what the meaning of the term "agent" is in paragraphs B and D.

PERB's Response:

In labor relations, a party may be represented by a non-attorney. An "agent" could include a labor relations representative, a union business agent, or officer of an organization.

Subpart 4, Serving a Form on Charged Party

MNSCU comments that subp. 4 should include a requirement that service be contemporaneous with filing of a charge with the Board.

PERB's Response:

There is no need for such a revision as the Rule 7325.0110, subp. 2(H) already requires that the charge form when filed must include "a statement that the charging party has served a complete copy of the charge on each party named as a charged party." Thus, service on the charged party is already mandated to occur before the charge is filed. No revision is necessary or appropriate.

Subpart 5, Receipt of a Charge

MNSCU comments that it is unclear whether the provision's intent is that the PERB notify the parties that the case has been docketed and assigned a case number or that the PERB is to repeat the service on the charged party already accomplished by the charging party.

PERB's Response:

The provision is designed to serve both purposes. The parties are notified that the case has been docketed and assigned a case number. Having the PERB send both the charging and charged parties a copy of the charge that includes the assigned case number promotes clear record-keeping by the Board and all parties and confirms for all parties that the charge has been received by the Board. The rule states what the Board will do; it needs no further clarification. No revision is necessary or appropriate.

Subpart 6, Submission of Evidence

LMC and MNSCU comment that it is not clear who determines "good cause" for an extension of the deadline nor who determines the presence of good cause.

PERB's response:

As the entire section concerns the investigator's receipt of evidence, it should be sufficiently clear to the reader that it is the investigator who determines good cause. Whether good cause exists in a particular case depends on the circumstances. The Federal and Minnesota Rules of Civil Procedure, for example, use "good cause" as the standard for judicial action in dozens of

provisions without thinking it necessary to define the term. No revision is necessary or appropriate.

Subparts 6–7, Submission of Evidence and Submission of a Response
CGMC, LMC, MMB, and MNSCU comment that evidence submitted to the investigator by a party should be shared with all other parties.

PERB response:
It is well recognized that, as a matter of labor policy, it is inappropriate for a government agency investigating an alleged unfair labor practice (ULP) to disclose the identity of, and information gained from, specific witnesses. See, for example, National Labor Relations Board, Casehandling Manual, Part 1, Unfair Labor Practice Proceedings, Investigation. The National Labor Relations Board (NLRB) recognizes that the conduct of complete investigations requires the ability to assure potentially vulnerable witnesses who may fear reprisal that the information they provide to the agency will be held confidential as long as possible. Similarly, the NLRB considers the information contained in active investigatory files to be excluded from requirements for disclosure of the Freedom of Information Act to permit the agency effectively to carry out its investigatory responsibilities. For the same reasons, confidentiality is necessary for PERB to carry out its responsibility under PELRA to investigate alleged ULPs. Confidentiality is equally necessary for initial submission of information under subp. 6 and for information subsequently received under subp. 7. The rules allow the parties to obtain relevant information later in the process at a pre-hearing conference or by a subpoena. Minn. Rule 7325.0110 Subp. 7; 7325.0250 Subp. 2. The Minnesota Government Data Practices Act will determine the classification of data. Minn. Ch. 13. PERB is not empowered by law to regulate government data practices. No revision is necessary or appropriate.

MNSCU comments that the rule should address whether information submitted must be in the form of affidavits or documents supported by sworn testimony.

PERB response:
No affidavits should be required of those providing information in an investigation. The Minnesota Legislature in Minn. Stat. 179A.041 created the PERB because it wished to transfer adjudicative jurisdiction over ULP allegations from the state district courts to a specialized administrative agency to afford the parties to such cases greater accessibility, simplicity, and efficiency. The statute permits all who wish to file charges to do so, with or without representation by counsel. It would be fundamentally antithetical to the Legislature's purpose for the agency to insist that those seeking its assistance submit information in the form of affidavits, just the kind of procedural formality that the Legislature sought to eliminate when creating the PERB. No revision is necessary or appropriate.

MNSCU comments that if a charging party submits additional evidence after a charged party submits evidence, the charged party should receive an extension of time to amend its response.

PERB response:
This comment assumes that the charged party has received the additional evidence submitted

by the charging party. As indicated above, the rules appropriately do not provide the charged party with access during the investigation to information submitted by the charging party, whether initially or in response to a subsequent request from the investigator. Thus, there would be no information available to the charged party that could form the basis of an amended response. The rules provide that the assigned investigator may request additional evidence from either party when necessary throughout the investigation process. Minn. Rule 7325.0110 Subp. 6-7. If a charge is amended, the rules provide for time to file a response to the amended charge. Minn. Rule 7325.0110 Subp. 7. No revision is necessary or appropriate.

MMB and MNSCU comment that the rule should state that a public employer may need to redact documents submitted to the PERB to comply with the Minnesota Government Data Practices Act.

PERB response:

It is not the function of the rules of the PERB to define the legal responsibilities of a public employer for compliance with data practices statutes. PERB is not empowered by law to regulate government data practices. No revision is necessary or appropriate.

Ramsey County comments that there is no provision in the rule for service of evidence to a party.

PERB response:

The rule appropriately does not require service upon a party of evidence submitted by another party. As explained above, it is not the intent of the rule, or consistent with labor policy, or the Minnesota Government Data Practices Act for supporting evidence submitted by a party to be provided during the investigatory process to another party. No revision is necessary or appropriate.

Subpart 7, Submission of a Response

Ramsey County comments that fourteen days is insufficient time for a charged party to submit a response to a charge.

PERB's Response:

Brief deadlines for responses, even shorter than fourteen days, are commonplace in labor relations, such as those for stages within the grievance process of collective bargaining agreements, because labor policy recognizes the need to resolve labor-management issues expeditiously. The Legislature has affirmed its desire for an expeditious process for resolution of ULP charges by permitting PERB to hold evidentiary hearings as soon as five days following issuance of a complaint. Minn. Stat. 179A.13, subd. 1(b). Moreover, the rule explicitly provides that if, in a particular case, fourteen days is insufficient, the investigator may grant an extension. No revision is necessary or appropriate.

7325.0120 MEDIATION

The LMC comments that the rules should provide that a mediator will be provided any time one was requested by both parties.

PERB's Response:

PELRA provides: "At any time prior to the close of a hearing, the parties may by mutual agreement request referral to mediation, at which time the commissioner shall appoint a mediator, and the hearing shall be suspended pending the results of the mediation." Minn. Stat. 179A.13 subd. 1(h). The rule states that the Board or its designee shall work with the Bureau of Mediation Services (BMS) to assign a mediator and undertake to conciliate or recommend mediation whenever it would advance the possibility of mutual resolution. If both parties request that a mediator will be provided, then arranging for a mediator would clearly advance the possibility of mutual resolution and the Board would do so. No revision is necessary or appropriate.

LMC and MNSCU comment that the rules should provide that the same person cannot serve as the investigator and mediator.

PERB's Response:

The personnel practices of the PERB are not appropriately the subject of these procedural rules. The Bureau of Mediation Services and the PERB are separate entities. The investigators described in this section are employed by the PERB. The PERB will respect conflict of interest best practices. No revision is necessary or appropriate.

Judge Cochran asked about the purpose of published proposed rule 7325.0120 when the statute provides that any time prior to close of a hearing parties may by mutual agreement request mediation referral and the hearing is suspended pending the results of mediation.

PERB's Response:

The published proposed rule makes clear that mediation may be useful and used at any stage of the ULP investigation and hearing process.

7325.0130 INVESTIGATION

Judge Cochran asked whether the rule imposed a deadline for the completion of an investigation.

PERB's Response:

The published proposed rules do not impose a deadline because the time necessary for an investigation will vary greatly depending on the complexity of each case. No revision is necessary or appropriate.

CGMC suggested that investigations should be completed within 30 days of a charge being filed and that failure to complete the investigation in 30 days should result in dismissal of the charge.

PERB's Response:

The published proposed rules do not impose a deadline because the time necessary for an investigation will vary greatly depending on the complexity of each case. The charging party should not be penalized for the length of time it takes the investigator to complete the investigation. No revision is necessary or appropriate.

Subpart 1, Informal Conferences
LMC, CGMC, and MNSCU comment that the rule should provide that BMS mediators not serve as investigators because they must maintain neutrality during mediation.

PERB's Response:
The personnel practices of the PERB are not appropriately the subject of these procedural rules. The Bureau of Mediation Services and the PERB are separate entities. The investigators described in this section are neutrals employed by the PERB. The PERB will respect conflict of interest best practices. No revision is necessary or appropriate.

Subpart 2, Withdrawal of a Charge
LMC, MMB, and MNSCU comment that the rules should provide that if a charge is withdrawn, all supporting documentation and evidence should be classified as non-public data as it is under Minn. Stat. 13.43, subd. 2(b) for grievances.

PERB's Response:
The Minnesota Government Data Practices Act will determine the classification of data. PERB is not empowered by law to regulate government data practices. No revision is necessary or appropriate.

7325.0150 DISMISSAL OF CHARGES

Subpart 1, Dismissal
LMC, MMB, and MNSCU comment that the charging party should not be given the opportunity to withdraw a charge that has no basis in law or fact. The commenters assert that there is a conflict between Minn. Rule 7325.0150, subp. 1, and Minn. Rule. 7325.0130, subp. 2.

PERB's Proposed Rule Changes:
Line 5.12 should be revised to read "... the board must dismiss the charge unless the charge is voluntarily withdrawn by the charging party."

PERB's Response:
Administrative agencies such as the NLRB, EEOC and MDHR permit charging parties to withdraw charges at any time. This promotes administrative efficiency. This revision makes clear that there is no conflict between the two subparts cited in the comments. This revision is not a substantial change to the published proposed rules.

LMC and CGMC commented that a rule should provide that charges that do not comply with the procedural requirements for a charge could be dismissed.

PERB's Response:
The standards for dismissal of a charge are established by Minn. Stat. 179A.13 subd. 1(b). No revision is necessary or appropriate.

MNSCU commented that a rule should state whether dismissal of a charge will occur upon the motion of a party prior to or following the hearing.

PERB Response:

The comment is unclear. The statute provides that the PERB alone may dismiss charges. If the comment intended to suggest the addition of a summary judgment procedure, such a procedure is not permitted by the statute. After a complaint is issued by the Board, the hearing officer will hold a hearing and issue a recommended decision and order. See Minn. Stat. 179A.13 subd. 1(b), (i), & (j). No revision is necessary or appropriate.

MNSCU comments that there should be a provision that addresses the relationship between the dismissal standard and the presence or absence of evidence required under section 7325.0110.

PERB's Response:

The comment is unclear. The statute provides that the PERB alone may dismiss charges. If the comment intended to suggest the addition of a summary judgment procedure, such a procedure is not permitted by the statute. The statute provides that charges that have no reasonable basis in law or fact will be dismissed. Minn. Stat. 179A.13, subd. 1 (b). No revision is necessary or appropriate.

MNSCU comments that the rules should address whether the absence of sworn evidence to support any element of a charge means that the charge is without a basis in fact or law.

PERB's Response:

The proposed rule would create a substantive rule of law inconsistent with the statute. The determination of whether a charge or allegation has a reasonable basis in fact or law must be done on a case by case basis. Testimony at a hearing will be under oath or affirmation. No revision is necessary or appropriate.

Subpart 2, Notification

MNSCU proposed that the rules set forth the right of appellate review to any party and that it is not limited only to the review of charges that are dismissed.

PERB's Proposed Rule Changes:

Lines 5.14-5.16 should be revised to read: "...notification to all parties to the case. ~~The charging party may request that the Minnesota Court of Appeals review the board's decision in accordance with Minnesota Statutes, section 179A.052.~~"

PERB's Response:

This deletion is appropriate because appeal rights of all parties are set forth in Minn. Stat. 179A.052. This revision is not a substantial change to the published proposed rules.

7325.0210 ANSWER

LMC, CGMC, MMB, and MNSCU comment that the rules should notify all parties within five working days that it is dismissing the charge.

PERB's Response:

Letters dismissing charges will be sent simultaneously to all parties as soon as practical. Time

limits for requesting review of the dismissal do not begin to run until the dismissal letter is mailed. Minn. Stat. 179A.052. No revision is necessary or appropriate.

Ramsey County and LMC comment that the lesser of 7 days from service of the complaint or 3 days before the hearing to file an answer is insufficient time, and that it should be 7 days from the date the complaint is issued.

MMB and MNSCU comment that the rule should be changed to allow 14 days to file the answer, which is consistent with the Rules of Civil Procedure.

PERB's Response:

The statute obligates the PERB to hold a hearing within 5 – 20 days of the issuance of a complaint. Minn. Stat. 179A.13, subd. 1(b). Therefore, the proposed timeframe is necessary to meet the statutory obligations. No revision is necessary or appropriate.

7325.0240 HEARING OFFICER DUTIES

LMC, CGMC, and MNSCU comment that the rule should provide that BMS mediators not serve as hearing officers because they must maintain neutrality during mediation.

PERB's Response:

The personnel practices of the PERB are not appropriately the subject of these procedural rules. The Bureau of Mediation Services and the PERB are separate entities. Hearing officers are neutral independent contractors of the PERB. The PERB will respect conflict of interest best practices. No revision is necessary or appropriate.

LMC comments that the rules should be similar to that of the NLRB in requiring that the hearing officer's recommended decision and order be required to contain detailed findings of fact, conclusions of law, and basic reasons for decisions on all material issues raised, and an order either dismissing the complaint in whole or in part or requiring the respondent to cease and desist from its unlawful practices and to take appropriate affirmative action.

PERB's Response:

Minn. Stat. 179A.13, subd. 1, para. (i) and (j) sets forth the obligations of the hearing officer with regard to the contents of the recommended decision and order. These include: findings of fact, conclusions, and recommended remedy if a ULP has been found. There is no persuasive reason to adopt a rule that would add to the statutory requirements. No revision is necessary or appropriate.

MMB and MNSCU comment that item D should say that the hearing officer may, rather than shall, sequester witnesses.

PERB's Proposed Rule Changes:

Line 6.16 should be revised to read: "<u>rule on motions to</u> sequester witnesses;"

PERB's Response:

This change clarifies that the hearing officer may sequester witnesses on motions from the parties. This revision is not a substantial change to the published proposed rules.

CGMC suggested that hearing officer recommended decisions and orders should be submitted within 30 days of the close of the hearing record.

PERB's Response:

The published proposed rules do not impose a deadline because the time necessary to write a recommended decision and order will vary greatly depending on the complexity of each case. No revision is necessary or appropriate.

7325.0250 PRE-HEARING CONFERENCES

Subpart 1, Conference

MMB and MNSCU comment that the rules should be changed not to require hearing officers to conduct pre-hearing conferences. The rule presently reads that they "shall" do so, and the proposed change would provide that the hearing officers "may" conduct such conferences.

PERB's Response:

The PERB believes that pre-hearing conferences are a valuable tool for promoting the exchange of information that allows the subsequent hearing to proceed in a more orderly and efficient manner. The parties may reduce the number of issues in dispute through stipulation. The hearing officer becomes familiar with the issues that will be disputed. Some cases might very well be settled as a result of a pre-hearing conference.

The rule does not require a face-to-face conference with the hearing officer and the parties. A telephone conference may be sufficient. The PERB believes such conferences will be helpful and lead to more efficient hearings. In the absence of a requirement it is likely that no conferences would be held because of the short time between the complaint and the hearing. The PERB believes that any inconvenience to the parties is outweighed by the benefit of such conferences. Without them, the hearing officer will have to spend time on the day of hearing dealing with details that could have been resolved at a pre-hearing conference. This leads to more costly and inefficient hearings. The rule requiring pre-hearing conferences will allow the evidentiary hearing to proceed more efficiently. No revision is necessary or appropriate.

MNSCU comments that the rules should require that parties make a good faith effort to stipulate facts to ensure sufficient process.

PERB's Response:

The published proposed rules address factual stipulations (Minn. Rule 7325.0220 and 7325.0250, subp. 4). The PERB will strongly encourage parties to stipulate facts whenever possible. Most parties attempt to stipulate facts in the interest of time and efficiency. A rule requiring parties to make a good faith effort is unnecessary. A rule requiring a good faith effort by the parties is unlikely to result in more stipulations. No revision is necessary or appropriate.

7325.0260 SUBPOENAS

LMC suggests that the rules should provide that subpoenas comply with Rules of Civil Procedure for District Courts of Minnesota, similar to rules for contested hearings under Minn. Rule 1400.7000 and Revised Uniform Arbitration Act under Minn. Stat. 572B.17.

PERB's Proposed Rule Changes:

Lines 7.13-7.14 should be revised to read: "...board if no hearing officer has been assigned and serve copies on all other parties. A subpoena must be served in the manner provided by the Rules of Civil Procedure for the District Courts of Minnesota."

PERB's Response:

This is a clarification of the published proposed rules. The change is similar to contested hearings under Minn. Rule 1400.7000 and Revised Uniform Arbitration Act, Minn. Stat. 572B.17. This revision is not a substantial change to the published proposed rules.

7325.0270 PROTECTIVE ORDERS

Ramsey County comments that there should be no prohibition of disclosure of otherwise public data. Transparency serves the interest of parties and public.

LMC and MMB comment that the rules should provide that a protective order can be issued at any time after a charge is filed. Use of terms "sensitive" and "protected" should not be used – "not public" is consistent with the MGDPA and should be sufficient.

PERB's response:

The Board considered there might be situations where protective orders should be broader than the MGDPA. Both the Minnesota Uniform Arbitration Act and the Minnesota Rules of Civil Procedure allow for protection of categories of information beyond that in the MGDPA. For example, the Minnesota Uniform Arbitration Act provides: "An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure as if the controversy were the subject of a civil action in this state." Minn. Stat. 572B.17(e). Hearing officers should have discretion to protect the interests of the parties and witnesses. No revision is necessary or appropriate.

Judge Cochran asked about the scope of the published proposed rule regarding protective orders.

PERB Response:

See PERB's response directly above.

Subpart 2, Closing a Hearing

LMC, MMB, and MNSCU suggest that the rules should be changed to be consistent with Minn. Stat. 14.60, subd. 2 and Minn. Stat. 13.085, subd. 4. The commenters request deletion of the terms "sensitive" and "protected."

MNSCU proposed new rule language as follows: "If the hearing record contains information that is not public data, the hearing officer may conduct a closed hearing to consider the information, issue necessary protective orders, and seal all or part of the hearing record, as provided in Minn. Stat. 14.60, subd. 2. If a party contends, and the hearing officer concludes, that not public data could be improperly disclosed while that party is presenting its arguments, the hearing officer shall close any portion of the hearing as necessary to prevent the disclosure." Minn. Stat. 13.085, subd. 4.

PERB's Response:

There might be situations where closing a hearing to protect information should be broader than the MGDPA. For the reasons stated above related to protective orders, hearing officers should have discretion to protect the interests of the parties and witnesses. Minnesota courts have authority to close hearings to protect confidential information. Minn. Gen. R. of Prac., Part H, Sec. 14. No revision is necessary or appropriate.

7325.0300 CONSOLIDATION

LMC, MMB, and MNSCU comment that the rules should list the criteria to be used when the Board determines whether to consolidate cases, such as "common question of law or fact" or "same parties" as required by Minn. Rule of Civil Procedure 42.01.

PERB's Response:

The statute is designed to provide a cost-effective and efficient process to resolve charges of ULPs. The rule allows consolidation to fulfill the purpose of PELRA. The published proposed rule is consistent with the NLRB rule that permits consolidation when "necessary to effectuate the purposes of the Act..." 29 C.F.R. 102.33. No revision is necessary or appropriate.

7325.0310 INTERVENTION

Ramsey County comments that it is concerned about the extent to which intervention by third parties is allowed.

PERB response:

The comment is unclear. Rule 7325.0310, subp. 3 specifically limits intervention based on specific considerations: interests of the intervenor, the objections raised by the parties, whether the interests of the intervenor will be adequately protected by the existing parties, and the timeliness of the request. No revision is necessary or appropriate.

7325.0320 RECORD

LMC and MNSCU comment that the rules should specify that the Board pays for the cost of digital transcription.

PERB's response:

The statute is silent as to what, if anything, the Board will provide to the parties. The Board's intent is to provide free digital transcriptions (audio recordings) to the parties. However, because of the uncertainty of technological developments, our budget, and the potential costs

of transcriptions, the Board is reluctant to guarantee free transcriptions to the parties. No revision is necessary or appropriate.

MNSCU comments that providing digital transcription to the parties is inconsistent with Minn. Stat. 179A.13, subd. 1(f), which requires transcription by a reporter appointed by the Board.

PERB's response:

Rule 7325.0320 is not inconsistent with Minn. Stat. 179A.13, subd. 1(f). The statute requires the existence of a transcript. The published proposed rule, more generously, calls for the Board to provide the parties with a digital transcript. No revision is necessary or appropriate.

Judge Cochran asked about the meaning of "data" in Subp. 3 (D) and whether it would permit the submission of additional evidence after the record is closed.

PERB's Response:

The published proposed rule does not allow the submission of additional evidence after the record is closed. The term "data" includes such things as copies of cases or other authoritative materials attached to a memorandum or brief.

7325.0400 EXCEPTIONS

Subpart 2, Number of Copies

MNSCU suggests that the PERB should not require four copies of documents submitted to the Board because this imposes costs on the parties and is bad for the environment.

PERB's Response:

The nature of factual and legal arguments submitted by the parties in the review process, such as legal briefs, are likely to be sufficiently complex that board members would be unable to carefully read and analyze them if they were limited to viewing the documents on electronic devices. For the PERB to accomplish its legislatively-assigned task of reviewing decisions of its hearing officers and those of the Commissioner of the Bureau of Mediation Services, it requires parties to cases to provide it with paper copies of materials. No revision is necessary or appropriate.

Subpart 4, Brief Supporting Exceptions

LMC and MNSCU comment that the PERB should limit the length of briefs submitted in support of exceptions or cross-exceptions to thirty-five pages in the absence of the permission of the Board.

PERB's Proposed Rule Changes:

Lines 10.6 of the published proposed rules should be revised to read: "...witnesses whose testimony supports its exceptions or cross-exceptions. Briefs may not exceed thirty-five pages in length except with permission of the board."

PERB's Response:

This change was made to provide guidance to the parties on the length of the briefs and mirrors Minnesota General Rule of Practice 115.05. This revision is not a substantial change to the published proposed rules.

Subpart 6 and 8: Response to exceptions.

Judge Cochran suggested that the Board delete the word "nonexcepting" in Lines 10.13 and 10.22 of the published proposed rules.

PERB's Proposed Rule Changes:

Line 10.13 of the published proposed rules should be amended to read: "...serve upon all other ~~nonexcepting~~ parties their responses..." Line 10.22 of the published proposed rules should be amended to read: "...serve upon all other ~~nonexcepting~~ parties a response..." These revisions are not a substantial change to the published proposed rules.

PERB's Response:

Judge Cochran has identified a drafting error. This revision is not a substantial change to the published proposed rules

Subpart 9, Request to File an Amicus Brief

LMC and MNSCU comment that the period for submitting a request to file an amicus brief should be extended from ten days to fifteen days after the first filing of exceptions to conform to Minnesota Court of Appeals procedures.

PERB's Response:

While arguments of amici may be useful to the Board in some cases, they risk delaying resolution of the dispute for its immediate parties. A ten-day deadline is appropriate because the person submitting the request need not submit its brief within ten days, but need only identify the person or entity desiring to submit a brief, its reasons for wishing to submit the brief, and whether it requests oral argument. Such a limited submission does not require more than ten days to prepare. As the Legislature explicitly assigned the process of adjudicating ULPs to the PERB, rather than to a court, there is no need for PERB to conform to procedures of the Court of Appeals. If the Legislature thought that the Board could compel a party to present its case in a hearing within five days of the Board's issuance of a complaint, Minn. Stat. Minn. Stat. 179A.13, subd. 1(b), it certainly would not have thought it necessary to afford more than ten days to an amici to submit a short statement of intent to submit a brief. No revision is necessary or appropriate.

7325.0410 PROCEEDINGS BEFORE THE BOARD

LMC, MMB, and MNSCU comment that if the Board initiates the review of a hearing officer's recommended decision and order on its own motion, the Board should bear the costs of reasonable attorneys' fees and other costs for both parties in all subsequent proceedings.

PERB's Response:

In Minn. Stat. 179A.13, subd. 1(k), the Minnesota Legislature authorized the PERB to review recommended decisions of a hearing officer upon timely filing of exceptions by a party "or upon its own motion." The Legislature did not authorize the PERB to pay the parties' costs for that review or any subsequent legal proceedings, nor did it appropriate funds for that purpose. Unless the Board has both statutory authority to pay parties' attorneys' fees and costs, as well as legislatively-appropriated funds to do so, the PERB may not do so. No revision is necessary or appropriate.

LMC, MMB, and MNSCU comment that the provision that permits the Board to review the decision of the hearing officer if "persons or entities not parties to the case may be adversely affected in the absence of Board review of the recommend decision and order" is too broad and should be deleted.

PERB's Proposed Rule Changes:

Lines 11.23-11.24 of the published proposed rules should be amended by deleting the following: "~~C. persons or entities not parties to the case may be adversely affected in the absence of board review of the recommended decision and order.~~"

PERB's Response:

The statute provides that a hearing officer's recommended decision and order, in the absence of Board review, is binding only on the parties to the case. Minn. Stat. 179A.13(k). Therefore, whether persons or entities not parties to the case may be adversely affected is unnecessary to consider in determining whether to review the recommended decision and order. This revision is not a substantial change to the published proposed rules.

GENERAL COMMENTS

Filing Fees & PERB-Related Costs

LMC, CGMC, MMB and MNSCU suggest that a fee be required for filing a ULP charge, pointing to the fee required for filing a data practices complaint, Minn. Stat. § 13.085, subd. 6(c), and the PELRA requirement that parties split an arbitrator's fee. Minn. Stat. § 179A.21, subd. 2.

LMC also comments that PERB should address how PERB-related costs are handled, and suggests the rules should state who is responsible for various costs.

PERB's Response:

These examples do not support the commenters' recommendation because the charging of fees in those instances is explicitly based on statutory authority. Similarly, the filing fees for the various Minnesota courts are all based on explicit statutory authority. See Minn. Stat. 357.021 (district court), 357.022 (conciliation court) and 357.08 (appellate courts). By contrast, PELRA's statutory language contains no authorization to charge a filing fee. See Minn. Stat. 179A.13.

The lack of a filing fee is consistent with the Legislature's goal of changing the ULP forum from district court to an administrative agency, thus allowing individuals or entities to pursue

ULP claims more easily. Many, if not most, Minnesota administrative procedures for asserting claims have no filing fee requirements. See, e.g., Human Rights Act (Minn. Stat. 363A.28); Occupational Health and Safety Act (Minn. Stat. 182.654, 182.699); Unemployment Compensation (Minn. Stat. 268.105, subd. 6); and Veterans Preference Act (Minn. Stat. 197.481). Additionally, PERB does not have statutory authority to charge parties for the PERB's operating costs.

Hearing Officer Qualifications

CGMC, LMC, Hennepin County Association of Paramedics and EMTs (HCAPE), and MNSCU commented that they wanted assurances that a qualified hearing officer would preside at ULP hearings.

HCAPE also suggested that the parties have the right to request an Administrative Law Judge (ALJ) from the Office of Administrative Hearings (OAH).

PERB's Response:

PELRA requires that hearing officers "be licensed to practice law" in Minnesota. Minn. Stat. 179A.13, subd. 1(d). An RFP was issued for the selection of hearing officers which included the desired qualifications of hearing officers. The Board carefully screened hearing officer applicants, both on their qualifications and a writing sample. The Board considered using ALJs from OAH. While the Board has great respect for OAH and its ALJs, the Board thought the better route was to select hearing officers with a background in labor law. Furthermore, the commenters' proposal to allow parties the option of selecting an ALJ from OAH, would likely be confusing to non-represented parties and might delay the hearing process.

Searchable Database and Website

Many commenters suggest that the PERB implement a searchable database and website for its hearing officers' decisions.

PERB's Response:

The Board agrees that posting its and the hearing officers' decisions on the website in a searchable database is desirable, but that website design is inappropriate for inclusion in these rules. While the PERB currently does not have its own website, one is under construction. The PERB currently uses the Bureau of Mediation Services (BMS) website.

Deferral Rule

MMB and MNSCU suggested that the Board adopt a "deferral rule" similar to that of the NLRB.

PERB's Response:

The NLRB does not have a deferral "rule." Its deferral practice has been developed through case decisions and not through regulation. Board members do not agree on whether the Board has the authority to adopt a deferral rule. Assuming such authority exists, the Board members disagree on whether any type of deferral is appropriate. Any deferral practice will be determined on a case-by-case basis.

The PERB has addressed the many concerns raised during the hearing and comment period. The PERB has shown that the rules are needed and reasonable. We respectfully submit that the Administrative Law Judge should recommend adoption of these rules including the amendments proposed here by the Board.

Respectfully submitted,

David Biggar, Chair
Public Employment Relations Board